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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1029

FREDERICK WEISER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–11a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1969 (Pet. App. 12a). A petition for rehearing was denied on December 10, 1969 (Pet. App. 13a). The petition for a writ of certiorari was filed January 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established entrapment as a matter of law.

2. Whether the trial court properly required petitioner to undergo examination by a government psychiatrist after he had raised an insanity defense based upon testimony by his own psychiatrist.

3. Whether petitioner's privilege against self-incrimination was violated by his conviction under 26 U.S.C. 7214(a)(8) which required him to report any offenses by other agents of which he knew.

4. Whether a part of the government's summation deprived petitioner of a fair trial.

5. Whether the introduction of recorded conversations between petitioner and government agent Wenig and between Wenig and other agents who acted in concert with petitioner violated petitioner's constitutional rights.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner, a former Internal Revenue Service agent, was convicted on eight counts of conspiracy to bribe, bribery, and failing to report violations of revenue laws, in violation of 18 U.S.C. 371, 201(b) and 26 U.S.C. 7214(a)(8). On March 31, 1969, he was sentenced to concurrent terms of 18 months' imprisonment on each count. The court of appeals affirmed.

The evidence showed that during the fall of 1966 the Internal Revenue Service conducted an undercover investigation into corrupt practices of its field

agents (D.A. 3a–4a).[1] As part of the plan, Inspector Harold Wenig assumed the guise of a dishonest inspector willing to sell confidential information to internal revenue agents who were being investigated by the I.R.S. inspection service. He furnished such information, for a fee, to agent Sidney Romanoff (D.A. 4a). Petitioner learned of this and asked Romanoff to arrange a meeting with Wenig (D.A. 6a–7a, 457a, 665a–667a).[2] Petitioner had been under investigation since 1965 on suspicion that a car wash business owned by his wife and other agents' wives was being used to conceal the receipt of bribes (D.A. 31a, 222a–223a, 573a–574a).

In December 1966, Wenig told Romanoff that he had obtained information for petitioner. Romanoff then arranged a meeting on December 6, 1966, between petitioner and Wenig at a shopping center on Long Island. He told Wenig that petitioner was willing to pay $100 for the information (D.A. 9a–12a). Romanoff introduced petitioner to Wenig at the shopping center and then left. Wenig produced a copy of questions which were to be used in a proposed interview of petitioner to be conducted by the Inspection Service concerning the car wash business. Petitioner and Wenig discussed the questions and the appropriate answers. Petitioner gave Wenig $100 in cash (D.A. 16a–32a, 209a–228a). They agreed that if

[1] D.A. designates petitioner's appendix in the court of appeals containing the transcript of the trial, which is on file with the clerk of this court.

[2] When Wenig learned from Romanoff of petitioner's desire for a meeting, he noted petitioner's name on a card (D.A. 464a–465a).

petitioner wanted to contact Wenig in the future, petitioner was to use the name "Mr. Caruso" (D.A. 32a, 229a).

At a second meeting between petitioner and Wenig, on December 13, 1966, Wenig disclosed that the Inspection Service was reviewing some large expenditures made by petitioner for carpeting, a maid, basement improvements, and furniture. Petitioner denied all of the expenditures, except $1,500 for new furniture. Petitioner disclosed that he never purchased items in local stores because the purchases could be easily traced. He also stated that, when asked at the interview to explain the source of his funds, he would say that his mother gave him the money on her deathbed (D.A. 41a–48a, 243a–249a, 253a–254a, 257a, 264a–266a). At the end of this meeting, Wenig mentioned the name of another agent, Marvin Kramer, who was also under investigation (D.A. 49a). Petitioner responded that Wenig should help him and that he was a "good boy" (Pet. App. 3a).

On December 15, 1966, petitioner telephoned Wenig to inform him that Kramer was interested in information regarding the investigation of his activities. The next afternoon, outside of Kramer's hearing, petitioner and Wenig reviewed the developments in petitioner's own investigation. Petitioner then told Wenig that Kramer was ready to pay for information. After petitioner left, Wenig gave Kramer confidential information in return for $100 in cash (D.A. 49a–53a, 62a–63a, 272a, 283a–291a).

Petitioner also contacted Wenig regarding investigations of two other agents, Max Kurman and Cesare Viviano. Petitioner and Wenig arranged meetings for these two agents, and petitioner introduced each of them to Wenig. By this time, the payment for the confidential information had increased to $200. Before the arranged meeting between Wenig and Kurman, petitioner paid Wenig an unsolicited $50 (D.A. 81a, 372a), remarking that he had avoided difficulty by knowing in advance the questions asked at his interview (D.A. 77a–96a, 322a–323a, 103a, 106a–110a, 339a–343a).

All of these arranged meetings took place in Wenig's car which had been wired with a tape recording machine. Transcripts of tape recordings of conversations between Wenig and petitioner were introduced into evidence after Wenig had testified to the content of the conversations. The government also introduced a few conversations Wenig had with Romanoff, Kramer, Kurman and Viviano at meetings arranged by petitioner (D.A. 113a–116a). None of these agents testified at trial.

ARGUMENT

1. The court of appeals correctly rejected petitioner's claim that he was entrapped as a matter of law.[3] He had known for more than a year that certain of his activities were under investigation (D.A. 31a, 222a–223a, 573a–574a). When he learned of Romanoff's

[3] At trial, petitioner requested only that the court submit the issue to the jury, which it did. For the first time in the court of appeals, petitioner argued that the trial judge should have found entrapment as a matter of law.

contact with Inspector Wenig, petitioner asked Romanoff to inquire whether Wenig had any information helpful to him (D.A. 6a–7a, 457a, 665a–667a). Romanoff, not Wenig, first mentioned petitioner's name in regard to selling information (D.A. 464a–465a).

After he established personal contact with Wenig, petitioner showed no reluctance to purchase information. In addition, he introduced other agents under investigation to Wenig, informed them of the fee for the information, and relayed messages between Wenig and these agents. This pattern of conduct hardly suggests entrapment, much less entrapment as a matter of law. Petitioner's actions show a willingness both to bribe an internal revenue inspector and to help others to bribe him. He was entitled to nothing more than to have the issue resolved by the jury. See *Lopez* v. *United States*, 373 U.S. 427, 436; *Masciale* v. *United States*, 356 U.S. 386, 388. *Sherman* v. *United States*, 356 U.S. 369, 372.[4]

2. On the second day of trial, petitioner raised an insanity defense based on his testimony and that of a psychiatrist (D.A. 560a–571a). This testimony was

[4] The trial judge did not improperly limit the cross-examination of Wenig by not allowing defense counsel to elicit the name of the "acquaintance" who had arranged the initial meeting between Wenig and Romanoff (D.A. 371a–376a). The trial judge fairly concluded that this line of questioning was not relevant to the case and requested that defense counsel narrow the inquiry. Defense counsel was allowed to ask whether this "acquaintance" was acting as a government agent and to explore generally Wenig's method of operation (D.A. 377a–379a). Defense counsel was thus given ample opportunity to develop facts relevant to his argument of entrapment.

that petitioner was not mentally responsible because he had been in a state of extreme depression at the time of the offenses due to emotional strain brought about by family problems (D.A. 477a–495a). Over petitioner's objection, the court granted permission for a government psychiatrist to examine petitioner (D.A. 151a–168a). After such examination, the psychiatrist testified at trial as to the effect of petitioner's family problems, and concluded that his depression would not have impaired his ability to conform his conduct to the requirements of the law. (D.A. 540a–547a).[5] He did not testify as to any statement which petitioner may have made to him concerning the offenses.

Petitioner claims (Pet. 15–16) that requiring him to submit to examination by the government psychiatrist violated his privilege against self-incrimination. The courts have held in similar circumstances, however, that the government should not be foreclosed from the opportunity to conduct a mental examination to meet the defense of insanity. *United States* v. *Baird,* 414 F. 2d 700, 707–709 (C.A. 2), certiorari denied January 12, 1970, No. 691, this Term. See *United States* v. *Albright,* 388 F. 2d 719 (C.A. 4); *Alexander* v. *United States,* 380 F. 2d 33 (C.A. 8).

3. Three of the counts on which petitioner was convicted charged violations of 26 U.S.C. 7214(a)(8) in that he failed to report violations of the revenue laws which he knew other agents were committing. The

[5] The testimony of both psychiatrists went to the "capacity to conform" standard of mental responsibility adopted by the Second Circuit in *United States* v. *Freeman*, 357 F. 2d 606, 622.

court below properly held that the claim that this statute required petitioner to come forward with self-incriminatory information was not supported by the *Marchetti-Grosso* line of cases [6] because petitioner was required only to report the violations by others and not himself. Cf. *Buie* v. *United States,* No. 271, this Term, decided December 8, 1969.

In addition, petitioner's trial was held more than a year after *Marchetti* and *Grosso* were decided. He should have been alert to the possibility of raising a self-incrimination issue at trial, and his failure to do so should be held to constitute a waiver of that claim. See *United States* v. *Covington,* 395 U.S. 57, 59; see also the government's brief in opposition in *Barsaloux* v. *United States,* No. 1043, this Term.[7] Indeed, trial counsel did not take advantage of the opportunity afforded by the trial judge to argue the issue (Pet. App. 11a, n. 2).

4. In summation, the prosecutor referred indirectly, but not by name, to James L. Marcus, who was involved in a celebrated bribery scandal at the time (D.A. 736a–737a). This isolated reference was not prejudicial. It did not suggest that the offenses here were comparable to the Marcus affair, but merely sought to emphasize that the statutes requiring the reporting of wrongdoing were designed to avoid scandals. And the

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[6] *Marchetti* v. *United States,* 390 U.S. 39; *Grosso* v. *United States,* 390 U.S. 62; *Haynes* v. *United States,* 390 U.S. 85; *Leary* v. *United States,* 395 U.S. 6.

[7] We are supplying petitioner's counsel with a copy of our *Barsaloux* brief.

trial judge instructed the jury to focus only on the evidence in the present case and specifically to disregard any other case that might have been mentioned (D.A. 745a).

5. *Bruton* v. *United States,* 391 U.S. 123, and *Roberts* v. *Russell,* 392 U.S. 293, do not support petitioner's contention that his right of confrontation was denied because recordings of conversations between Wenig and other agents (Romanoff, Kramer, Kurman and Viviano) were introduced at trial. As the court of appeals held (Pet. 10a), there was in each instance a sufficient showing made to the court that petitioner was a party to a joint scheme involving these other agents, and accordingly, the declarations were admissible as statements in furtherance thereof. See *Bruton* v. *United States, supra,* 391 U.S. at 128 n.3. The fact that a formal conspiracy charge was not brought against Kramer, Kurman, and Viviano is not essential. See *United States* v. *Granello,* 365 F. 2d 990, 995 (C.A. 2), certiorari denied, 386 U.S. 1019.

Petitioner further contends that the introduction of recordings of his conversations with Inspector Wenig in Wenig's automobile violated his Fourth Amendment rights under *Katz* v. *United States,* 389 U.S. 347.[8] Unlike *United States* v. *White,* No. 46, this Term, set down for reargument on January 19, 1970, the party who consented to the recording in this case, Inspector Wenig, testified to the content of the conver-

[8] There was no Sixth Amendment violation since all the recordings took place prior to indictment. Compare *Hoffa* v. *United States,* 385 U.S. 293, with *Massiah* v. *United States,* 377 U.S. 201.

sations prior to the admission in evidence of the recordings, which served only to corroborate Wenig's testimony. See *Lopez* v. *United States,* 373 U.S. 427. Nevertheless, the Court may wish to defer disposition on this issue until *White* is decided.[9]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[9] It should further be noted that the overhearings in issue here occurred in December 1966 and *Katz* has been held to apply only to overhearings conducted after it was decided (December 18, 1967). See *Desist* v. *United States,* 394 U.S. 244, 254; *Kaufer* v. *United States,* 394 U.S. 458.

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